

ADMINISTRATIVE APPEAL DECISION

MR. FRANK KREJCI, FILE NO. 2000-11140

OMAHA DISTRICT

27 September 2001

Review Officer: Mores Bergman, U.S. Army Corps of Engineers (Corps), Northwestern Division

Appellant: Frank Krejci, F & J Enterprises

Appellant's Representatives: James E. Lang of Laughlin, Peterson & Lang Attorneys at Law, and Barbara Hayes of Hayes Environmental

Receipt of Request For Appeal (RFA): June 8, 2001

Site Visit Date: July 23, 2001

Background Information: On February 18, 2001, Ms. Barbara Hayes, the appellant's environmental consultant, requested a Department of the Army jurisdictional determination (JD) from the Corps Omaha District (District), in conjunction with a project proposed by Mr. Krejci.

The area in question is a 7.55 acre site located in Section 21, Township 15N, Range 10E, Douglas County, Nebraska. The site was previously identified as a jurisdictional wetland in January 1998, in connection with a neighboring development project. Ms. Hayes requested the District to provide a new JD for this area in light of the U.S. Supreme Court decision regarding Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, Case No. 99-1178, dated January 9, 2001 (SWANCC). In the SWANCC decision, the Supreme Court determined that isolated waters, based solely on use by migratory birds, are not within Corps of Engineers jurisdiction under Section 404 of the Clean Water Act.

The District has determined that an existing road ditch that runs parallel to U.S. Highway 275 as well as to the wetland area in question is a water of the U.S. This ditch carries water from one water of the U.S. (unnamed tributary in Section 9), located north of the site in question to another water of the U.S. (unnamed tributary in Section 33) located south of the site. The diversion of water flow from the tributary water of the U.S. into the ditch occurred several years ago when the State Department of Roads rebuilt the highway and road ditch. The road ditch carries water flow from the diverted tributary water of the U.S. to the other tributary water of the U.S., which is located approximately three miles south of the point of diversion of first water of the U.S.

On April 12, 2001, the District's Nebraska Regulatory Office provided Ms. Hayes with an approved JD, which stated that the wetland area in question is adjacent to a tributary water of the U.S. and is thus subject to regulation by the Department of the Army, Corps of Engineers, under the Clean Water Act.

On June 8, 2001, Mr. James Lang submitted a RFA on behalf of Frank Krejci.

Reasons For Appeal submitted by the Appellant's Representative: (condensed for brevity)

Reason 1: There are no jurisdictional waters of the United States present on the project site. The wetlands on the project site are not adjacent to "waters of the United States" and as a result, are isolated wetlands and not subject to Corps' jurisdiction.

Reason 2: The District's letter, dated April 12, 2001, which provided an approved JD, failed to include a basis of JD setting forth a summary of indicators supporting the JD.

Reason 3: The District failed to include a Notification of Appeal Process (NAP) and RFA form with the approved JD in their letter of April 12, 2001.

Reason 4: The project wetlands are isolated wetlands, which come within the U. S. Supreme Court ruling of SWANCC, and as such, the Corps has no jurisdiction over these isolated wetlands.

Reason 5: Mr. Mike Rabbe, the Nebraska Regulatory Office State Program Manager, was removed from the permitted West Shores development project (Corps permit NE1998-10098). The same reasons for his removal exist presently that existed at the time Michael Rabbe was removed from the permitted West Shores development. Therefore, Mr. Rabbe should not be involved in the jurisdictional determination for this project, which is part of the West Shores development.

Information Received and Its Disposition During the Appeal Review:

1. The Omaha District provided a copy of the administrative record, which included their basis of the JD, and aerial photography and maps of the area in question. This information was considered in the appeal review process.
2. By letter of July 6, 2001, Mr. James Lang submitted additional information regarding appeal Reason 5, at the request of the Review Officer. This information was considered in the appeal review process.

Summary of Appeal Decision:

Appellant's Reason 1: Does not have merit. Information in the District's administrative record and observations made during the site visit indicate that the site is a wetland adjacent to a tributary water of the U.S.

Appellant's Reason 2: Does not have merit. The administrative record shows that a summary of the basis of the JD was included in the District's April 12, 2001, letter providing the approved JD. Additionally the record shows that on June 4, 2001, further explanation of the basis of JD was provided to the appellant and his representatives.

Appellant's Reason 3: Does not have merit. Although it is correct that the appellant's representative was not provided a NAP/ RFA form with the approved JD letter, the form was provided at a later date. This initial oversight did not affect the appellant's ability to file an appeal.

Appellant's Reason 4: Does not have merit. The District's administrative record shows that the wetlands on the site in question are not isolated, but rather are adjacent to a tributary water of the U.S. and are thus not excluded from Corps jurisdiction by the Supreme Court ruling in the SWANCC case.

Appellant's Reason 5: Does not have merit. There is no evidence that Mr. Rabbe was biased regarding the jurisdictional determination for this project. The District's record shows that the determination was based on the facts of the case.

Appeal Decision Findings and Instructions for District Action (if required):

Reason 1: There are no jurisdictional waters of the United States present on the project site. The wetlands on the project site are not adjacent to "waters of the United States" and as a result, are isolated wetlands and not subject to Corps' jurisdiction.

Finding: This appeal reason does not have merit.

Action: No action required by District.

Discussion: The definition of waters of the U.S. contained in the Corps Regulation 33CFR 328.3(a)(5), provides that tributaries to waters of the U.S. are also waters of the U.S. Part 328.3(a)(7) also provides that wetlands adjacent to other waters of the U.S. (other than those adjacent to other wetlands) are waters of the U.S. The regulation, Part 328.4 further provides that jurisdiction in non-tidal waters of the U.S., except when wetlands are present, extends to the ordinary high water mark (OHWM) of the waterbody. It further states "When adjacent wetlands are present, jurisdiction extends beyond the OHWM to the limit of the adjacent wetlands".

The RFA did not question that the project site contained wetlands. Rather, it contends that the wetlands on the site are isolated and therefore are not under the jurisdiction of the Corps as a result of the Supreme Court decision in the SWANCC case. In the RFA, Mr. Lang states: "the drainage structure between the property in question and Highway 275 is a standard roadside ditch and is not a navigable water and not a tributary to a navigable water." In support of this statement, he refers to wording used by the

District in the Functional Assessment for the West Shores project document, dated February 1999 (West Shores is an adjoining development project also owned by Mr. Krejci). Mr. Lang further noted that in the Functional Assessment, Mr. John Peterson, the Nebraska Regulatory Office (NRO) permit project manager for the West Shores permit action, described the drainage structure along the property as an “adjacent highway ditch”. Mr. Lang also noted that the assessment document for the West Shores project identified the wetland site that is the subject of this appeal, as being part of a group of wetlands that were labeled as isolated wetlands.

In a telephone conversation with Mr. Peterson, on or about June 18, 2001, Mr. Bergman was informed that in 1998, when the JD was made for the West Shores project, the NRO did not differentiate between isolated and adjacent wetlands in making their JD calls. At that time (before the SWANCC decision), they assumed they had jurisdiction over all wetlands that met the definition of wetlands contained in regulation 33CFR 328.3(b). In 1998, the NRO utilized the wetlands delineation data and map prepared by the applicant’s consultants in making the JD for the project. The data sheets, dated December 1997 through January 1998, and the wetlands map, dated May 1998 do not indicate whether the wetlands on the site are isolated or adjacent. It is important to note that the JD for the West Shores project and the functional assessment are two different documents that have two different purposes. Although it is acknowledged that the Functional Assessment document did label the subject wetland as an “Isolated PEMA” (Cowardin term describing type of wetland-emergent marsh) the JD prepared for that project did not. The JD that was provided by the NRO on April 12, 2001, is the current JD for the wetland site in question. It was prepared at the request of the appellant’s environmental consultant, because of the uncertainty as to whether or not the wetland site in question is now outside the Corps jurisdiction as a result of the SWANCC decision by the Supreme Court.

The administrative record for this JD decision includes aerial photographs and maps that show the property in question as well as the areas to the north and to the south of that property and also shows the road ditch that runs along the east side of the property. These documents show that the road ditch intersects and diverts water flow from one tributary water to another tributary water. This fact was verified during the site visit on July 23, 2001. The tributary water that was diverted into the road ditch is located in section 9 of township 15 north, range 10 east, Douglas County, NE. The road ditch carries water from this tributary approximately three miles south, where it then connects back into another tributary water of the U.S., which flows into the Elkhorn River, which is also a water of the U.S. The road ditch in question and the tributary waters were observed during the site visit to have evidence of OHWMs. The District’s determination that the road ditch is a water of the U.S. is in accordance with Corps policy guidance, which is contained in the “Final Notice of Issuance of Nationwide Permits” document that was published in the Federal Register, Vol. 65, No. 47, dated March 9, 2000 (page 12823). That document states: “Drainage ditches constructed in uplands that connect two waters of the U.S. may be considered waters of the U.S. if those ditches constitute a surface water connection between those two waters of the U.S.” This is the situation that exists in this case. Corps Headquarters also provided guidance to Districts in a memorandum, dated May 11, 2001 which requires Districts to continue the use local

practices, that were in effect prior to the January 9, 2001 SWANCC decision, in determining the “tributary” status of waters and the “adjacency” status of wetlands, pending the promulgation of new national policy. The District had published written procedures on November 17, 1995 entitled MRO 95-10, Jurisdictional Determinations Regarding Road/ Railroad Ditches. This document was prepared as guidance for District field offices, and provides that road ditches that capture flow and convey waters of the U.S. would be regulated. At the site visit on July 23rd, Mr. Rabbe informed Mr. Bergman that the above guidance was used when making the JD for the project site in question.

Regulation 33CFR 328.3(a)(7) provides that wetlands adjacent to waters of the U.S. are also waters of the U.S. Part 328.3(c) of the regulation states “The term “adjacent” means bordering, contiguous, or neighboring.” The regulation further states that “wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands.” The aerial photos and maps contained in the District’s administrative record show the wetland site in question to be located immediately next to, or “adjacent to”, the road ditch which the District determined to be a water of the U.S. The site visit on July 23rd confirmed that this was the case.

Reason 2: The District’s letter, dated April 12, 2001, which provided an approved JD, failed to include a basis of JD setting forth a summary of indicators supporting the JD.

Findings: This appeal reason does not have merit.

Action: No action required by District.

Discussion: The Appeals Regulation 33CFR 331.2 requires that an approved JD will include a basis of JD with the document. The regulation also defines the basis of JD as “a summary of the indicators that support the Corps approved JD”.

In reviewing the letter, dated April 12, 2001 providing the approved JD, it is found that the District provided a summary statement of the basis of JD in the document as follows: “we reviewed aerial photography of the wetlands in question. Our review found these wetlands to be contiguous to the adjacent tributary that flows between this property and Highway 275.” The letter then went on to explain the Supreme Court ruling in the SWANCC case and concluded with “our review, finds that the DA [Dept of the Army] does have the authority to regulate the placement of fill materials into these wetlands under Section 404 of the Clean Water Act”. Although this basis of JD was brief, it is considered to meet the requirement of the Appeals Regulation. In addition, the District met with the appellant on June 04, 2001 to further explain their basis for jurisdiction.

Reason 3: The District failed to include a Notification of Appeal Process (NAP) and RFA form with the approved JD in their letter of April 12, 2001.

Finding: This appeal reason does not have merit.

Action: No action required by District regarding this appeal reason. However, the District is reminded that the NAP/ RFA forms are to be sent to affected parties with the appealable decisions.

Discussion: The Appeals Regulation 33CFR 331.4 states “For approved JDs, the notification must include a NAP fact sheet, a RFA form, and a basis of JD.”

Although it is correct that the appellant’s representative was not provided the NAP/ RFA forms with the District’s approved JD letter, the record shows that the forms were provided at a later date (June 8, 2001), which still allowed time for the appellant to file an appeal. The record also shows that one or more discussions did occur between April 12, 2001 and June 8th, 2001, between the District and the appellant’s representatives, during which the representatives were informed of the appellant’s right to appeal. This procedural error on the part of the District is considered a harmless error, which did not prevent the appellant from filing his appeal, nor does it have any bearing on the real issue of the appeal, which is whether or not the site in question contains “waters of the U.S.”

Reason 4: The project wetlands are isolated wetlands, which come within the U. S. Supreme Court ruling of SWANCC, and as such, the Corps has no jurisdiction over these isolated wetlands.

Finding: This appeal reason does not have merit.

Action: No action required by District.

Discussion: In the January 2001, SWANCC decision, the Supreme Court decided that Corps exceeded its statutory authority by asserting Clean Water Act (CWA) jurisdiction over an abandoned sand and gravel pit in northern Illinois that provides habitat for migratory birds. In SWANCC, the Court held that the “Migratory Bird Rule” (Federal Register Vol. 51, No 219, Nov.13, 1996, page 41217) is not supported by the CWA and the Court’s holding is strictly limited to waters that are non-navigable, isolated, and intrastate. Any waters outside of that category may still be regulated under the CWA to the full extent of the Corps’ authority under the statute and regulations and consistent with case law. Traditionally navigable waters, interstate waters, their tributaries, and adjacent wetlands are still considered “waters of the U.S.”

As discussed in the “Discussion” section for Reason 1 above, I concur with the District’s determination that the wetlands on the site in question are not isolated but instead are wetlands adjacent to a tributary water of the U.S. and are therefore also waters of the U.S. Since these waters are not isolated waters with their JD based on migratory bird use, they are not excluded from Corps jurisdiction by the Supreme Court ruling under SWANCC.

Reason 5: Mr. Mike Rabbe, the Nebraska Regulatory Office State Program Manager, was removed from the permitted West Shores development project

(Corps permit NE1998-10098). The same reasons for his removal exist presently that existed at the time Michael Rabbe was removed from the permitted West Shores development. Therefore, Mr. Rabbe should not be involved in the jurisdictional determination for this project, which is part of the West Shores development.

Finding: This appeal reason does not have merit.

Action: No action required by District.

Discussion: Upon reviewing the RFA, the additional information provided by Mr. Lang in his July 6, 2001 letter, and the administrative record for this case, no evidence was found that supports the claim that Mr. Rabbe, the Nebraska State Manager for the Omaha District, was biased regarding the jurisdictional determination for this project. The District's record shows that the determination was based on a review of the wetland delineation, maps and aerial photos of the area in question and on a field verification of the facts of the case. Although Mr. Rabbe signed the "approved JD" for the site in question, the record shows that he relied on information provided by Mr. John Peterson to make the JD call. It is normal procedure for Mr. Rabbe and other Omaha District State Program Managers to review and sign most Regulatory decision documents that are prepared by the subordinate staff members in their offices.

Also for the record, Mr. Bergman contacted Ms. Kathryn Schenk, the District Regulatory Branch Chief, on July 25, 2001 and was informed that Mr. Rabbe had not been removed from the West Shores permit case. She indicated that, at Mr. Rabbe's request, the District Regulatory Branch office did assist his office in reviewing the West Shores permit case because of the complexity of the case.

Overall Conclusion: After reviewing and evaluating information provided by the appellant, the District's administrative record, and information gathered at the site visit and from other sources, I conclude that this Request For Appeal does not have merit for the reasons that are provided in the discussion above.

Delegation of Authority: By memorandum, dated August 7, 2000 the Division Engineer, Northwestern Division, delegated the authority for making decisions on the appeal of jurisdictional determinations to the Chief of Operations Division, Northwestern Division, in accordance with regulation 33CFR 331.3(a)(1).

FOR THE DIVISION ENGINEER:

(Signed)

Peter C. Gibson
Chief, Operations Division